No. 682

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

COVINGTON MILLS, ALABAMA MILLS, INC., et al
Petitioners

vs.

JAMES P. MITCHELL, SECRETARY OF LABOR,
TEXTILE WORKERS UNION OF AMERICA,
NATIONAL ASSOCIATION OF COTTON MANUFACTURERS,
et al

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT TEXTILE WORKERS UNION OF AMERICA IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in determining the minimum wage which government procurement agencies shall specify in their contracts for the purchase of textile products, the Secretary of Labor is required by the Walsh-Healey Act to disregard his finding that there is a single competitive nation-wide market, unrelated to the geographic location of producing units, for products of the textile industry, and required to find separate textile minima for each locality in which textiles are manufactured or furnished.

2. Whether Congress can constitutionally give the Federal Courts the duty of overseeing, at the behest of any manufacturer or dealer in the affected industry, the Secretary of Labor's determination as to the terms on which government procurement agencies shall offer to purchase supplies.

STATEMENT

The statement of the case in the petition for certiorari omits several pertinent facts.

Under the Walsh-Healey Act the Secretary of Labor is required to determine for the government procurement agencies the minimum wage which such agencies shall specify in their contracts as the minimum wage to be paid in the performance of the work contracted for. Since 1948, the minimum wage so determined on a single industry basis, for the textile industry has been 87 cents per hour. 13 F. R. 6083. In January, 1952, the Textile Workers Union of America filed a petition with the Secretary of Labor claiming that this determination was out-dated because of the increased wage levels in the industry and asking, therefore, that he make a new finding as to the prevailing minimum wage in the industry. (R. 18, 55.)

Hearings were held in September, 1952, a notice of proposed amendments to the pre-existing wage determination was issued, exceptions were filed to this proposed amendment, and finally on January 15, 1953, the Secretary of Labor issued the final notice of amendment which is here under attack. (R. 9, 14, 55.) Insofar as here relevant, the amendment found that the prevailing minimum wage for persons employed in the manufacturing or furnishing of the products of the cotton, silk and synthetic branch of the textile industry was $1.00 per hour.

It is this amendment to the Secretary's pre-existing finding as to the prevailing minimum wage in the textile industry which is here under attack.

The principal issue in the administrative proceeding, from the beginning, was whether the Secretary, in making his

finding as to the prevailing minimum wage for this particular industry, should make a single industry-wide finding, as in the past, or should make separate, individual determinations of the prevailing minimum wage for textile plants in each of the separate local communities in which textiles are produced. (It was never urged so far as we know, that the Secretary should make findings as to the prevailing minimum wages for *all* workers in each local community, or even for workers in selected groups of industries in each community. The contention, rather, was for a determination of the minimum *textile* wage in each community.)

The Secretary did not make his determination on this contested issue in a vacuum. On the contrary, his final decision was based on the specific findings as to the nature of this particular industry which are set forth on pages 30-32 of the record. The testimony before the Secretary showed, and he found, that competition in this industry is nationwide in scope and marketing of the products of the industry is on a national scale. It is rare in this industry for a mill to market its product within a limited geographical area. The usual practice, indeed, is to sell the vast bulk of textiles through the textile center known as Worth Street in New York City. In this center, producers of textiles from such widely separate areas as Maine and Alabama compete for the same business, and the location of a plant has virtually no effect on its competitive position.

The same pattern which the Secretary found to be true of the industry generally applied to government purchases of textiles. In the normal case, the government invites bids from firms located in every textile producing area and bids are received from mills in widely separated regions. There is no way of ascertaining in advance where a proposed government textile contract may be performed. Indeed, various steps in the processing of a single product may take place in different states and different regions.

Based on these findings as to the nature of the textile industry, the Secretary concluded that the only appropriate way of effectuating the purposes of the Act was to continue the previous practice, with respect to wage determinations in this particular industry, of investigating and finding the prevailing minimum wage on an industry-wide basis. On the basis of data covering the entire industry, he found that the prevailing minimum wage was $1.00 per hour.

The Secretary's determination was immediately challenged in the courts in this proceeding. His findings with respect to the nature of the industry and the need for an industry-wide determination were not challenged. Instead it was urged that the Secretary lacked authority under the Walsh-Healey Act to make this kind of determination, irrespective of the nature of the industry.

This contention was upheld in the District Court, which felt compelled to follow the decision of the Court of Appeals in *Lukens Steel Co.* v. *Perkins,* 107 F. 2nd 627 (D.C. Cir. 1939) *reversed on other grounds,* 310 U.S. 113. The Court of Appeals, however, reversed, refusing to upset an administrative practice of 19 years' standing which Congress itself had refused to change. One judge dissented. A petition for rehearing was filed and denied by the whole Court, with two members other than the judge who had dissented on the merits voting in favor of a hearing *en banc.*

SUMMARY OF ARGUMENT

This case arises as a result of an unsuccessful effort to amend the Walsh-Healey Act so as to change its consistent, 19 year old, interpretation. The proponents of the substantive charges in the Act, being unable to pass them, settled for a provision throwing this hot political issue into the courts. Having no choice, the Court of Appeals took jurisdiction, but refused to reverse the administrative interpretation which Congress had itself refused to change.

The decision of the Court of Appeals is correct and accords with both the proper judicial approach to this kind of problem and the language of the statute itself. There is no conflict with the decision of any other Court of Appeals and none is likely to appear. If this Court denies certiorari, the question of statutory interpretation involved will, for all practical purposes, be finally resolved and the Secretary of Labor will be free to continue to apply the Walsh-Healey Act in the same way as it has been consistently applied in the 20 years since its passage.

By denying certiorari the Court will, furthermore, avoid decision of the difficult constitutional question—not decided by any of the courts below—of whether Congress may constitutionally confer jurisdiction on the Federal courts to adjudicate what this Court has found, in *Perkins v. Lukens Steel Co.*, 310 U.S. 113 not to present a justiciable case of controversy.

ARGUMENT

I. THIS COURT SHOULD NOT UNDERTAKE TO REVIEW ACTION BY THE SECRETARY AS HOUSEKEEPING AGENT FOR THE GOVERNMENT WHICH CONGRESS HAS REFUSED TO REVERSE

This is, in many respects, an extraordinary litigation. Unlike most cases of judicial review of administrative action, there is here no administrative ruling directly bearing on the litigants. The Walsh-Healey Act, unlike the Fair Labor Standards Act, does not in itself require anyone to pay a certain level of wages. Nor does a minimum wage determination by the Secretary of Labor under the Act have such an effect.

The nature of the Act and of the determinations made by the Secretary under it have been aptly described by this Court in the *Lukens Steel* case:

"Acting through its agents as it must of necessity,

the Government may for the purpose of keeping its own house in order lay down guideposts by which its agents are to proceed in the procurement of supplies, and which create duties to the Government alone. It has done so in the Public Contacts Act." 310 U.S. at 127.

"In this legislation Congress did no more than instruct its agents who were selected and granted final authority to fix the terms and conditions under which the Government will permit goods to be sold to it. The Secretary of Labor is under a duty to observe those instructions just as a purchasing agent of a private corporation must observe those of his principal . . . For erroneous construction of his instructions, given for the sole benefit of the principal, the agent is responsible to his principal alone because h . misconstruction violates no duty he owes to any but his principal. The Secretary's responsibility is to superior executive and legislative authority." 310 U.S. at 129.

Furthermore, as this Court also said in *Lukens*:

"the process of arriving at a wage determination [by the Secretary of Labor] contains no semblance of these elements which go to make up a litigable controversy as our law knows the concept." 310 U.S. at 113.

Why, then, in the light of the nature of the Act and of the Secretary's function in making a wage determination, did Congress reverse the decision of this Court in the *Lukens* case as to the lack of standing to sue and provide for judicial review of the Secretary's wage determinations. Why, in particular, did it pinpoint the "locality" and "open market" questions?

The legislative history of the so-called Fulbright amendment supplies the answer. Properly speaking, that history goes back to January, 1937, when Secretary of Labor Perkins, in the very first minimum wage determination under

the Walsh-Healey Act, made an industry-wide finding as to the prevailing minimum wage in the men's work clothing industry.[1] Through the years that followed, Secretary after Secretary continued the practice of making wage determinations on an industry-wide basis wherever examination of the facts in the particular industry indicated that this was appropriate.[2]

This practice was public and notorious. It was well known to Congress. In addition to the Secretary's annual reports to Congress, which set forth the specific determinations made, there were innumerable legislative hearings in which the Secretary's practice was made known.[3] And, since this Court's decision in the *Lukens* case in 1940, it has been clear that Congress, and Congress alone, had the power to correct any misconstruction of his authority by the Secretary.

During this period there were, naturally, some who objected to the Secretary's practice, and there were numerous recommendations for legislation to amend the Act so as to prevent the continuation of this practice.

But Congress took no action on any of the suggested amendments of the Act until 1952. At that time the administrative proceedings in this very case were already pending and known to Congress. Although a hearing had not yet been held, the petition of the Textile Workers Union of America had been filed and note of it was made on the floor of the Senate.[4]

Whether or not in response to this particular administrative proceeding, Senator Fulbright in the spring of 1952

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[1] Wage Determination for Men's Work Clothing Industry, 2 F.R. 233 (February 4, 1937).

[2] 41 CFR, Parts 202 *et seq.*

[3] See, e.g., H. Rept. 2608 on H.R. 6449, 75th Cong., 3d Sess. (1938), Hearings before Senate Committee on Education and Labor, 76th Cong., 1st Sess. (1939) pp. 95, 105.

[4] 98 Cong. Rec. 3258 (1952).

proposed to amend the Walsh-Healey Act by inserting provisions in a bill then before the Congress to amend and extend the Defense Production Act of 1950.[5] Three separate amendments to the Walsh-Healey Act were proposed. The first would have statutorily reversed the administrative interpretation of the "locality" provision. The second would have changed the language of the open-market exemption. The third would have made the determination procedure subject to the provisions of the Administrative Procedure Act.

In his formal statement introducing these amendments, Senator Fulbright noted that the first—relating to the locality question in issue in this case—would require a change in the existing administrative interpretation of the Act. He then made no charge, however, that the administrative interpretation was contrary to the statute or that the change was necessary to accomplish the original Congressional intention.[6] Instead, he argued that the existing and accepted practice of the Secretary was socially and economically undesirable. In sharp contrast to such reasons, he did charge, with respect to the second amendment—relating to the "open-market" exemption—that the Secretary of Labor had in effect rewritten the exemption, contrary to the Congressional intention, and that the proposed amendment was therefore necessary to correct the misinterpretation.[7]

The Senate Banking and Currency Committee which

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[5] 98 Cong. Rec. 4128 (1952).

[6] In the hearings which subsequently took place Senator Fulbright did make the contention, now made here by petitioners, that the original Congressional intention was to require determinations to be limited to local communities, although he seemed to say that they should be based not on a particular industry but on "industries operating in the locality" in which the contract is to be performed. Hearings before the Senate on Banking and Currency on S. 2594 and S. 2645, 82d Cong., 2d Sess. (1952) pp. 2603, 2705. Other Senators disagreed, of course, *id.* at 2618, 2642.

[7] 98 Cong. Rec. 4128.

considered these amendments rejected the first proposed amendment, relating to the "locality" question. It did, however, recommend the other two amendments and included them in the bill which it reported on May 27, 1952, with three northern Democratic Senators objecting to the "open-market" change.[8]

When the matter came to the Senate floor, however, there was opposition even to these two proposals. A group of New England Republican Senators proposed to offer on the floor an amendment to the reported bill which would eliminate all of the proposed changes in the Walsh-Healey Act.[9]

The legislative situation thus posed was a difficult one. The Korean War was in progress and the amendments to the Walsh-Healey Act had been interjected, in the Senate only, into the consideration of the Defense Production Act, emergency legislation which, if not extended, would expire on June 30, 1952.[11] The divisions among the Senators as to the Walsh-Healey Act crossed party lines and tended to divide both parties in the spring of a Presidential year. As often happens in such a situation, it seemed desirable to the proponents of change to find a face-saving method of avoiding a division on these difficult issues. Such a solution was found.

Senator Fulbright, and those who supported a change in the substance of the Walsh-Healey Act, agreed to withdraw their changes. (Actually, at the time this agreement was reached, the only substantive change in the bill before the Senate concerned the open-market exemption. The amendment on the locality question had been lost in Committee, with Senator Fulbright's apparent concurrence.) In return, the New England Senators who opposed any change in the Walsh-Healey Act agreed to a provision making determinations subject to the Administrative Procedure

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[8] Senate Report No. 1599 on S. 2594, 82d Cong., 2d Sess.

[9] 98 Cong. Rec. 6336.

[11] Senate Report No. 1599 on S. 2594, 82d Cong., 2d Sess., p. 36.

Act and subject to review at the behest of any aggrieved person—who was "deemed" by the compromise to include every manufacturer in an industry in which a determination was made. They agreed also to a newly written specific provision making it clear that, even after contracts were executed containing the prescribed stipulations, the Courts could review not only the open-market question but also the locality question and any other legal issues that might appear.[12] On this basis, the compromise substitute was adopted unanimously by the Senate[13] and was subsequently agreed to by the House conferees.[14]

Congress, in sum, was fully advised and informed as to the consistent administrative action which its agent, the Secretary of Labor, had taken in administering the Government's program with respect to procurement. It was proposed by some that Congress, as the principal, revise its instructions to its agent, in two respects: (1) The Secretary's authority to base his minimum wage findings on industry-wide data, and (2) the scope of the exemption from the Act of "open-market" purchases. Congress refused to make either change. Instead, it made the question of whether its agent had properly complied with his instructions subject to judicial review. It thereby transferred to the federal courts the burden of deciding questions which the proponents of change in the administration of the Act were afraid to bring to a vote in the Congress.

As Senator Fulbright said of the compromise which was enacted:

> ". . . any other approach, it seems to me, would have involved a long and difficult and uncertain controversy, which might not have been successful. But when this

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[12] 98 Cong. Rec. 6529-6530.

[13] 98 Cong. Rec. 6531.

[14] House Conference Report No. 2352, 82d Cong., 2d Sess., pp. 27-28.

approach was suggested, it seemed to me wiser to follow it. After it has had an opportunity to work; if the courts do not interpret it in the way Congress thinks they should, we of course, would have an opportunity to change the basic law." 98 Cong. Rec. 6531.

The present case arises as a direct consequence of this decision to pass the buck to the Federal courts. The administrative proceeding involved was pending when the Fulbright amendment was before Congress and was the first one concluded after its passage. Involved in the law suit are substantially all of the major manufacturers of cotton, silk, and synthetic textiles. The southern manufacturers, many of whom in fact pay minimum wages in excess of $1.00, accepted the Congressional invitation to be "deemed" persons aggrieved and joined together as plaintiffs; the northern manufacturers intervened as defendants. The major union in the industry also joined as a defendant. All of the parties having an economic interest in the matter have, thus, transferred their controversy from Congress to the Federal courts.

That this is an undersirable result is, we think, plain. But, assuming the constitutionality of the Fulbright amendment (a point we touch on below) the courts below were required to hear the case. This Court is not. Review in this Court is a matter of discretion and, we submit, that discretion should be exercised to deny further hearing in a case of this nature.

The Court of Appeals has declined to reverse the administrative interpretation which Congress, with full awareness of the facts, itself refused to overrule. This Court should terminate the matter right there by denying further review. Any other course would place upon this Court the burden of deciding a question which Congress not only has power to decide, but which we believe Congress also has the duty to decide—either by refusal to amend the act, as in

the past, or by a change in the terms of the statute. This Court should not place itself in the position of rescuing the objectives of those who desired amendment of the statute but did not have the votes in Congress to achieve that amendment. Nor, we believe, should it even enter the controversy in the absence of any Congressional mandate that it do so.

II. THE DECISION BELOW IS CLEARLY CORRECT

Even if we ignore the obvious attempt to obtain through litigation a result which Congress refused to enact, the decision below is clearly correct.

The arguments against that decision—the best of which are set out in the petition for certiorari—miss the essential point because they misstate the issue. According to petitioners, the question is whether the Walsh-Healey Act gives the Secretary the power to find a "single and uniform Nation-wide standard . . . for [the] entire industry or . . . the wage standards . . . prevailing in their respective localities." This is *not* the question. We concede that if the Secretary were to make findings on a community basis, covering all of the industries in a given area, he would be restricted by the "locality" language of the Act. He would be required, in the words of the statute, to make a finding as to the prevailing minimum wage in the "groups of industries currently operating in the locality." But the Secretary is also given authority to make findings as to the minimum wage paid to persons "employed on similar work" or paid in the "particular industry." The question is whether, if he chooses to proceed in that fashion, he is also required to make his findings for similar work or for a particular industry on a locality-by-locality basis.

The question, in short, is not whether Congress intended to require a manufacturer to come up to national wage standards or community wage standards. If the Secretary chose to proceed on a geographical rather than an industry

basis, the answer is clearly the latter. That is, if he chose to make a finding as to the prevailing minimum wage in an area, either for all industry or specified groups of industries, and as a result all government contracts, or contracts in the industries covered, would require that all workers in that particular area be paid the specified minimum, then the finding would have to be limited to the "locality." But the Secretary has not proceeded in that way here. Here the question is whether, in exercising the alternative power to proceed on a single-industry basis, the Secretary is required to set standards for that industry on the basis of wages paid in that industry generally or the wages paid *in that industry* in each local community.

The distinction is of tremendous importance because the wage differentials between different industries are very often larger than differentials between geographical areas within the same industry. For example, as of the date of the hearings herein, the prevailing minimum wage for this particular industry was found to be $1.00 per hour, when all the plants, both in the high and low wage sections of the country, were considered. The minimum wage in New England actually was higher than this prevailing minimum: $1.13½. But the difference between the two was much smaller than the difference between minimum textile wages and minimum steel wages, even in the same areas. The uniform minimum wage in the basic steel industry on the date of the hearings herein—in Alabama as well as Pennsylvania—was $1.43½. (It is now $1.69½.) The difference between wages paid in the high and low wage areas of this industry were thus substantially smaller than the difference between the wages paid in this industry and the wages paid in the steel industry in the same "locality."

Under the Act, as construed by the Secretary, a prevailing wage finding could be made either on a single industry basis or on a community basis. What the petitioners contend for is neither. They do not ask for a local community

standard—including wages paid in other industries such as steel—but a standard limited both by industry *and* by geography. And they insist that this kind of standard is the only kind of standard which the Secretary is permitted to use in making single industry or similar work determinations.

In support of this contention they rely primarily upon a "legislative history" distilled primarily from casual comments made by individual members of Congress while the bill was on the House floor. Once the distinction between community standards and industry standards is seen, however, most of these comments are quite consistent with the Secretary's interpretation of the Act. All but one of the remarks quoted refer to prevailing wages in the community, presumably meaning the prevailing minimum for all or groups of industries in the community. They do not exclude the possibility that the Secretary could also proceed not by finding community levels for all industry but national levels for a particular industry. At most they show that in finding general levels the Secretary was restricted to local communities. That this is a proper construction of these remarks is shown by the very statement of Congressman Healey—one of the authors of the bill—upon which petitioners so strongly rely. He clearly indicated that the community approach was only one of alternative standards. As he put it, the standard set by the bill was:

> "the prevailing minimum wage *for similar work or in the industries operating in the locality* . . ."[15]

The casual statements on the floor of the House by other Congressmen referring to community wage standards are balanced by other statements which affirmatively support the Secretary's position. Thus, Representative Citron, whose statement about community wage standards is relied upon by petitioners, also said, in the very same speech, that "the opposition to this measure . . . comes from Southern man-

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[15] 80 Cong. Rec. 10002, quoted at p. 16 of the petition herein.

ufacturers who would be forced to raise their labor standards" [16] and that the bill was necessary to prevent unfair competition from firms moving to "sections where they can take advantage of low standard wages." [17]

The plain fact is that the language of this statute is ambiguous and its legislative history unclear. What is clear is that if it is construed as suggested by petitioners it would, first of all, be incapable of administration. Hundreds of separate community minima for each industry would have to be found, after notice and hearing and, presumably, revised at each change in wage levels. And even if it were possible to accomplish this, the only effect would be to punish those whom Congress meant to protect and encourage an economic movement which Congress meant to impede.

As the Court of Appeals correctly pointed out, the only effect of an act so administered would be freeze the wage costs of producers in high wage areas and offer an inducement for government suppliers to move their shops to less industrialized communities having lower wage levels. Indeed, as construed by petitioners, the Act would reward most the producer who moved his plant to a community where there was no textile mill. Whatever wage he chose to pay would be prevailing textile wage for that "locality."

There is no evidence that Congress intended to set up any such system of incentives. To the contrary, deterrence of the "runaway shop" movement was one of the prime considerations in the enactment of the bill. As Senator Walsh said, in supporting the bill before the House Committee:

> "The boot and shoe industry is being wiped out in the boot and shoe centers of Massachusetts . . . They are moving up to New Hampshire; the are moving up to Maine; they are moving into rural parts of my own

[16] 80 Cong. Rec. 10008.
[17] 80 Cong. Rec. 10009.

State and paying one-half the wages that are paid in localities where the labor organizations have been able to demand and exact a living wage." (Hearings before the House Judiciary Committee on S. 3055, 74th Cong., 1st Sess. p. 117)

Or, as the Commissioner of Labor Statistics said, an example showing the need for legislation was a case of:

> ". . . a union firm breaking its contract with the union, shutting down its plant, going to a State something like a thousand miles away, opening up a new plant under much lower conditions than normal standards, and getting a contract with the Federal Government, because under the law it was the lowest bidder and therefore could get the order." *Id*, at p. 13.

The effects described by Senator Walsh and Dr. Lubin would, of course, take place only in an industry in which competition was nation-wide and variations in wage rates paid were an important competitive factor—i.e., in an industry like the textile industry. But, in such industries, the act which Congress passed to limit the incentive for runaway shops would have the absurd effect of encouraging them, if the petitioner's construction of the Act is correct. Surely the courts should affirmatively recoil the government's purchasing agencies to adopt such a construction, irrespective of the facts, only on a showing in the clearest possible terms that Congress so intended. And no such showing is here made either by reference to the words of the statute or by selecting isolated words uttered by a few Congressmen in floor debate, particularly where the intention sought to be shown by those selected quotations is contradicted by other statements of the sponsors of the legislation, Senator Walsh and Representative Healey.

III. THERE IS NO CONFLICT

The petition does not claim any conflict of circuits or, indeed, any conflict between the decision of the Court of Appeals and any decision of this Court. Much is made of the fact that several District Judges in the District of Columbia, had prior to the decision of the Court of Appeals, come to a different conclusion than that ultimately reached by the Court of Appeals. But this, surely, was to be expected in view of the prior opinion of the Court of Appeals in the *Lukens* case. The matter is now settled in the District of Columbia Circuit and the decisions of all courts in the Circuit will presumably conform to the mandate of the Court of Appeals in this case.

Nor is conflict between the circuits likely to arise. Certainly there will be no future controversy about the $1.00 minimum wage in view of the increase in the minimum wage for all industries affecting commerce to $1.00 per hour. And determinations for other industries will continue to be tested in the District of Columbia Circuit since—as petitioners correctly point out—the Secretary of Labor may be sued only in the courts of the District of Columbia.

The result is that if this Court denies certiorari this matter will be at rest. Or, more precisely, the matter will be precisely where it was when Senator Fulbright abandoned his effort to change the substantive law and instead, sought to achieve a reversal of existing practice by referring the matter to the courts. As he said then, if the interpretation is not what Congress thinks it should be, "we of course, would have an opportunity to change the basic law."

IV. DENIAL OF CERTIORARI WILL AVOID DECISION ON A CONSTITUTIONAL ISSUE NOT PASSED ON BY THE COURTS BELOW.

The petitioners here are 158 separate companies who have joined in this suit pursuant to the provision in the so-called Fulbright Amendment which says that review of wage deter-

minations under the Walsh-Healey Act may be had by any person adversely affected or aggrieved thereby.

> "who shall be deemed to include any manufacturer of, or regular dealer in materials, supplies, articles or equipment purchases or to be purchased by the Government from any source, who is in any industry to which such wage determination is applicable."

This statute, upon which jurisdiction here is based, contains no requirement that the plaintiff actually be adversely affected. That is to say, it does not require that he be a manufacturer who pays wages lower than the prevailing minimum found by the Secretary, or that he is a manufacturer who has in the past or will in the future enter into contracts for the sale of materials to the Government. Indeed, even as to manufacturers who would meet such unspecified requirements, there would be no legal aggrievement or adverse effect since, as this Court has said in the *Lukens* case, they can have no legal interest in the terms under which the purchasing agents of the Government will permit goods to be sold to it.

It would seem plain, therefore, that there is implicit in this case a serious constitutional question as to whether the grant of jurisdiction contained in the Fulbright Amendment is consonant with the requirements of Article III of the Constitution. This question is a two-fold one. First, there is the question, in the words of the Court of Appeals, in another case under the same statute, of "whether Congress may constitutionally redefine as a case or controversy under Article III a dispute which the Supreme Court has held not to be such a case or controversy." *Textile Workers Union of America* v. *Allendale Co.*, 226 F. 2d 765, 767 (D.C. Cir., 1955).

Second, there is the question of whether Congress can grant jurisdiction without limiting such jurisdiction to the

cases in which some more or less direct economic aggrievement can be shown by the plaintiffs.

With respect to the first question, this Court has said that "a wage determination by the Secretary contemplates no controversy between parties and no fixing of private rates; the process of arriving at a wage determination contains no semblance of these elements which go to make up a litigable controversy as our law knows the concept. . . . Judicial restraint of those who administer the Government's purchasing would constitute . . . a departure into fields hitherto wisely and happily apportioned by the genius of our polity to the Administration of another branch of government." *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 at 127-128. This language surely seems to intimate that the lack of judicial power to interfere with the administration of the Government's purchasing operations is based not only on a lack of Congressional authorization for such interference, but on the basic separation of powers provided for in the Constitution. Indeed, this Court said almost that when it said in the *Lukens* case, that it rested its conclusion that the plaintiffs lacked standing

> "upon reasons deeply rooted in the constitutional divisions of authority in our system of Government and the impropriety of judicial interpretations of law at the instance of those who show no more than a mere possible injury to the public." 310 U.S. at 132.

Even if it be assumed that Congress could create a litigable controversy where this Court has found none to exist, there remains the second question as to whether it can issue a grant of jurisdiction in the particular terms of the Fulbright amendment. Certainly it seems to us far fetched to argue that there is a case or controversy in the constitutional sense between the Secretary of Labor and a manufacturer who has never done Government work and who is under contract with the union to pay wages in excess of the minimum which,

if the Secretary's order is valid, will be specified as the minimum wage to be paid in work performed for the government. Yet the Fulbright amendment would appear to grant jurisdiction over just such a case.

We advise this Court of the existence of these constitutional issues with some diffidence, since we did not press argument on them in the courts below in this case, and there has been no decision on them. But, they do go to the jurisdiction of this Court to hear the case, although not necessarily to the jurisdiction of the District of Columbia courts.[18] We therefore feel under an obligation to point out to the Court that a question as to jurisdiction does exist which was not argued or decided in either of the courts below.[19]

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[18] Federal Radio Commission v. General Electric Co., 281 U. S. 464.

[19] This Court is, we think, entitled to a full explanation of our failure to press this jurisdictional question in the courts below. In the District Court, we did, in the proposed answer which we attached to our motion to intervene, set forth our contention that the Fulbright Amendment is unconstitutional. Our intervention, however, was opposed by the plaintiffs. And one of the grounds for the opposition was "the familiar ground that an intervenor has no right to challenge the jurisdiction of the Court . . . *Fink* v. *Oliver Mining Co.*, [35 F. Supp. 316 (D. Minn. 1941)]".

Despite the opposition, our motion to intervene was granted. Subsequently, however, and while this case was still pending in the District Court, a similar suit was instituted to set aside the Secretary of Labor's determination as to the prevailing minimum wage in the woolen and worsted industry. *Allendale Co.* v. *Mitchell*, now pending in the Court of Appeals for the District of Columbia Circuit. We filed a motion to intervene in that case similar to that filed in the present case.

In Allendale, however, our motion, as well as a motion by a manufacturer who sought to intervene on the side of the Secretary, was denied in the District Court. We appealed that denial. But, until the appeal was decided, we did not judge it appropriate to jeopardize our now uncertain status as an intervenor by pressing the constitutional point which we had pleaded in our answer.

While the appeal on the intervention question was pending in the Court of Appeals in the Allendale case, the present case was argued and decided in the District Court and argued in the Court of Appeals.

It is our position that, irrespective of these constitutional issues, this Court should deny certiorari, for the reasons earlier stated. But the Court may feel that the fact that the case does contain a constitutional issue as to jurisdiction, which has not been refined by the process of briefing, argument and decision in the courts below, and as to which it does not have the opinion of the Court of Appeals, is an additional reason for denying certiorari.

The decision of the Court of Appeals in this case is not a decision upholding the constitutionality of the Fulbright Amendment, even *sub silentio,* since the Court found the

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Finally, on July 14, 1955, the Court of Appeals *en banc,* after reargument, rendered a 4-3 decision reversing the order of the District Court which had denied the motion to intervene. *Textile Workers Union of America* v. *Allendale Co.*, 226 F. 2d 765. In addition to deciding that the District Court erred in denying the motions to intervene, the Court of Appeals noted the existence of the constitutional issue as to jurisdiction. That issue, it said, would probably be determined in the main suit. But, it continued, "unless and until the trial court decides that this litigation is beyond the judicial power, both appellants should be permitted to intervene."

In accordance with this decision, we promptly and vigorously pressed our constitutional objection in the only forum then remaining open to us. The instant case already had been argued in the Court of Appeals. The *Allendale* case, however, was still pending in the District Court. After being admitted to intervention in that case on remand from the Court of Appeals, we filed a motion to dismiss on the ground that the statute upon which jurisdiction was based was unconstitutional. We filed a memorandum and presented oral argument in support of that motion and it was considered by Judge Youngdahl in the District Court at the same time as cross motions for summary judgment which had also been filed by the parties.

On February 10, 1956, Judge Youngdahl overruled our motion to dismiss and, at the same time, found generally for the defendants on the merits. The plaintiffs have appealed the judgment on the merits to the Court of Appeals. *Allendale Co.* v *Mitchell,* No. 13,187. *We* have appealed the denial of our motion to dismiss. *Textile Workers Union of America* v. *Allendale Co.*, No. 13,190. Both appeals are now pending in the court of Appeals. We intend, when the case is heard in that Court, to press our appeal and thus to obtain and adjudication by the Court of Appeals of the constitutional issue which that Court pointedly noted in the earlier appeal in the same case.

plaintiffs had no case on the merits and thus was not compelled to decide the jurisdictional question *sua sponte* (despite its express notice of the issue in its earlier decision in the *Allendale* case). Cf. *Huffman* v. *Ford Motor Co.*, 345 U.S. 330. But if certiorari is granted by this Court we feel that our responsibility as counsel and to the Court will require us to press the issue here and thus present it to this Court for decision.

CONCLUSION

For the reasons above set forth, it is respectfully submitted that this Court should deny the petition for certiorari.

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